

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Cavalier Telephone, LLC,)	
)	
Complainant,)	
)	
v.)	File No. PA-99-005
)	
Virginia Electric and Power Company)	
d/b/a Virginia Power,)	
)	
Respondent.)	
)	

ORDER

Adopted: December 2, 2002

Released: December 3, 2002

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. This Order resolves several outstanding proceedings in a long-running, multi-forum dispute between Cavalier Telephone, LLC (“Cavalier”) and Virginia Electric and Power Company (“Dominion”). The parties indicate that they have settled all the issues in dispute in their various proceedings and have filed several joint motions as part of their settlement. In this Order, we grant the parties’ joint motion to withdraw two applications for review filed by Dominion, and a joint motion to withdraw a motion for immediate affirmance and enforcement of a Cable Services Bureau order¹ addressing a complaint Cavalier filed against Dominion pursuant to section 224 of the Communications Act of 1934, as amended (“Act”).² We also grant, in a separate order, a joint motion to dismiss another complaint Cavalier filed against Dominion on April 1, 2002.³ Finally, as part of their global settlement and dismissal of pending proceedings, the parties have also jointly moved to vacate the *June 7 Bureau Order*. Based on the particular circumstances present here, we grant the joint motion to vacate as well.

¹ *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, Order and Request for Information, 15 FCC Rcd 9563 (Cable Serv. Bur. 2000) (“*June 7 Bureau Order*”).

² 47 U.S.C. § 224 (“*Pole Attachment Act*”).

³ *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, Order, File No. EB-02-MD-005 (MDRD-Enf. Bur. rel. December 3, 2002).

II. BACKGROUND

2. Dominion provides electric and telecommunications services in Virginia.⁴ Cavalier is a facilities-based competitive local exchange carrier (“LEC”) that, at the time this dispute arose, was constructing a fiber optic network in Richmond, Tidewater and Northern Virginia, with the intent to offer local telephone service, high-speed Internet access and Internet caller identification in these areas.⁵ As part of its network construction, Cavalier sought to attach equipment to Dominion’s poles.⁶ This effort spawned multiple adjudications.

3. Because the parties’ settlement and requested vacatur resolves the multiple proceedings that remain between the two parties, it is important to understand the general nature of these proceedings. Thus, set forth below is a summary of the various proceedings between Cavalier and Dominion, including Commission proceedings, federal and state court actions, appellate proceedings, arbitration proceedings, and mediations.

4. *The Commission Complaint.* On November 30, 1999, Cavalier filed a complaint (“Complaint”) against Dominion pursuant to the Commission’s pole attachment complaint procedures alleging that “it has been effectively denied access to poles owned by [Dominion].”⁷ Specifically, Cavalier sought an order compelling Dominion to grant Cavalier access to all support structures and right-of-ways, cease engaging in or imposing unreasonable and discriminatory terms, conditions, and practices for access to Dominion’s poles, and to refund to Cavalier “excessive rental and other administrative, engineering, and make-ready fees.”⁸ In addition, Cavalier argued that Dominion had imposed an unlawful pole attachment rate, and requested that the rate be reduced to the maximum rate permitted pursuant to the Commission’s pole attachment rate formula.⁹

5. *The June 7 Bureau Order.* In the *June 7 Bureau Order*, the Cable Services Bureau largely granted the Complaint. The Cable Services Bureau deferred consideration of the pole attachment rate issue, however, and ordered Dominion to provide additional information

⁴ *June 7 Bureau Order* at 9567, ¶¶ 8-9.

⁵ *Id.* at 9566-67, ¶ 8.

⁶ *Id.* at 9567, ¶ 9.

⁷ *Id.* at 9567, ¶ 9. Absent regulation by a particular state, the Commission must regulate the rates, terms, and conditions for attachments by a cable television system or telecommunications service provider to poles, ducts, conduits, and rights-of-way owned or controlled by utilities. 47 U.S.C. § 224(b), (c). To this end, the Commission has established procedures to resolve complaints regarding the rates, terms, and conditions relating to pole attachments. See 47 C.F.R. §§ 1.1401 *et seq.*

⁸ *June 7 Bureau Order* at 9567, ¶ 9.

⁹ *Id.* at 9567, ¶ 9.

that would enable the Cable Services Bureau to calculate the appropriate pole attachment fee.¹⁰

6. *The September 18 Bureau Order.* On September 18, 2000, the Cable Services Bureau released an order addressing the reasonableness of Dominion's pole attachment rate.¹¹ The Cable Services Bureau determined that the rates charged by Dominion were unjust and unreasonable, and ordered Dominion to reimburse Cavalier for charges over a certain amount beginning the date the Complaint was filed, November 30, 1999.¹²

7. *The Applications for Review and Motion for Immediate Affirmance.* On July 7, 2000, Dominion filed an Application for Review of the *June 7 Bureau Order*, in which Dominion lodged multiple grounds for reversing the Cable Services Bureau's *June 7 Bureau Order*.¹³ Further, on October 18, 2000, Dominion filed an Application for Review of the *September 18 Bureau Order*¹⁴ requesting that the Commission reverse the *September 18 Bureau Order*. Cavalier opposed Dominion's Applications for Review.¹⁵ Further, on February 20, 2001, Cavalier filed a motion requesting that the Commission affirm and enforce the *June 7 Bureau Order*.¹⁶ Cavalier's motion asserted that Dominion refused to comply with the *June 7 Bureau Order*, and that continued noncompliance would cause Cavalier irreparable harm.

8. *Related Proceedings.* On the same day that Cavalier filed its Motion for Immediate Affirmance and Enforcement at the Commission, Cavalier also petitioned the United States District Court for the Eastern District of Virginia for the enforcement of the *June 7 Bureau Order*.¹⁷ Cavalier maintained that Dominion had not complied with the *June 7 Bureau Order* and sought an injunction requiring certain actions by Dominion.¹⁸ The court issued a

¹⁰ *June 7 Bureau Order*, 15 FCC Rcd at 9573-4, 9578, ¶¶ 21, 33-34.

¹¹ *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, Order, 15 FCC Rcd 17962 (Cable Serv. Bur. 2000) ("*September 18 Bureau Order*").

¹² *September 18 Bureau Order*, 15 FCC Rcd at 17963-4, ¶ 4.

¹³ *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, Application for Review of Virginia Electric and Power Company, PA File No. 99-005 (filed July 7, 2000).

¹⁴ *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, Application for Review of Virginia Electric and Power Company, PA File No. 99-005 (filed October 18, 2000).

¹⁵ *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, Opposition to Application for Review, PA File No. 99-005 (filed July 24, 2000); *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, Opposition to Application for Review, PA File No. 99-005 (filed November 2, 2000).

¹⁶ *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, Motion for Immediate Affirmance and Enforcement of Bureau Order, PA File No. 99-005 (filed February 20, 2001).

¹⁷ *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, Joint Motion to Vacate, PA File No. 99-005 (filed November 6, 2002) at 2-3 ("*Motion for Vacatur*").

¹⁸ *Id.* at 3.

temporary restraining order against Dominion on February 23, 2001, and a preliminary injunction on April 13, 2001, granting in part and denying in part the relief sought by Cavalier.¹⁹

9. Both parties appealed the district court's order to the United States Court of Appeals for the Fourth Circuit.²⁰ On August 30, 2002, the Fourth Circuit reversed and remanded the case to the district court with instructions to dismiss the complaint on the ground that Cavalier had failed to exhaust its administrative remedies.²¹ The Court of Appeals subsequently denied Cavalier's petition for rehearing, and also denied Cavalier's motion to stay issuance of the mandate pending application to the United States Supreme Court for a writ of *certiorari*.²²

10. The dispute between the parties also spread into an alternative dispute resolution forum. On February 26, 2002, the parties participated in a day-long mediation of some of their outstanding claims.²³ The mediation was unsuccessful, and Dominion then filed with the American Arbitration Association ("AAA") a Demand for Arbitration of alleged outstanding payments due it by Cavalier.²⁴ After litigating the arbitrability of the matter, the AAA concluded that it had jurisdiction to arbitrate the matter and would do so, but stayed the arbitration pending resolution of yet another pole attachment complaint Cavalier filed with the Commission on April 1, 2002.²⁵ That pole attachment complaint alleges, among other things, that Dominion's attempt to compel arbitration before the AAA violated the *June 7 Bureau Order* and thereby created an unjust and unreasonable term and condition of attachment in violation of section 224 of the Act.²⁶

11. Apparently not satisfied with their attempts to obtain relief at the Commission, in federal court, and in arbitration, the parties initiated proceedings in yet another venue — state court. On April 12, 2002, Dominion filed a Motion to Compel Arbitration in the Circuit Court for the City of Richmond, Virginia, pursuant to the Uniform Arbitration Act.²⁷ Cavalier removed the Motion to Compel Arbitration to the United States District Court for the Eastern

¹⁹ *Id.* at 3, citing *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, Civ. No. 3:01CV106 (E.D. Va., Feb. 23, 2001).

²⁰ *Motion for Vacatur* at 3.

²¹ *Id.*, citing *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, 303 F.3d 316 (4th Cir. 2002).

²² *Motion for Vacatur* at 3.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 3-4. See *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, Complaint, File No. EB-02-MD-005 (filed Apr. 1, 2002) ("*Cavalier IP*").

²⁶ *Motion for Vacatur* at 4.

²⁷ *Id.*

District of Virginia, and Dominion filed a Motion to Remand.²⁸ By order dated May 21, 2002, the federal district court remanded the Motion to Compel Arbitration to the state court.²⁹ Following remand, the Circuit Court for the City of Richmond entered an order on June 12, 2002, requiring the parties to arbitrate.³⁰ Cavalier filed a Notice of Appeal to the Virginia Supreme Court, but later dismissed the Appeal.³¹

12. On April 29, 2002, Cavalier filed a “Motion to Lift Stay and for Contempt” in the United States District Court for the Eastern District of Virginia, claiming that Dominion’s demand for arbitration filed with the AAA and its motion to compel arbitration in state court conflicted with the federal court’s orders enforcing the *June 7 Bureau Order*.³² The district court denied Cavalier’s motion in an opinion and order entered June 11, 2002.³³ Cavalier filed a Motion to Alter or Amend the district court’s judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, which the district court also denied.³⁴

13. On June 30, 2002, the parties participated in mediation at the Commission in an attempt to resolve the disputes at issue in the cases pending before the Commission.³⁵ The mediation was unsuccessful.

14. *The Current Motions.* On November 6, 2002, the parties reported to the Commission that they had reached a global settlement of all the issues between them.³⁶ As part of that settlement, the parties jointly filed three motions in this proceeding: a joint motion to vacate the *June 7 Bureau Order*; a joint motion to withdraw the Applications for Review of the *June 7 Bureau Order* and the *September 18 Bureau Order*;³⁷ and a joint motion to withdraw the

²⁸ *Id.*

²⁹ *Id.*, citing *Virginia Electric and Power Company v. Cavalier Telephone, LLC*, Civ. Act. No. 3:02cv246 (E.D. Va. May 21, 2002).

³⁰ *Motion for Vacatur* at 4, citing *Virginia Electric and Power Company v. Cavalier Telephone, LLC*, Case No. HS-624-3 (Richmond Cir. Ct.).

³¹ *Motion for Vacatur* at 4.

³² *Id.*

³³ *Id.* at 4-5, citing *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, Civ. Act. No. 3:01cv106 (E.D. Va. June 11, 2002).

³⁴ *Motion for Vacatur* at 5.

³⁵ *Id.*

³⁶ *Id.* at 2, 5.

³⁷ *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, Consent Motion to Withdraw Applications For Review of June 7, 2000 and September 18, 2000 Orders of the Cable Services Bureau, PA File No. 99-005 (filed November 6, 2002) (“*Motion to Withdraw AFRs*”).

Motion for Immediate Affirmance and Enforcement of the *June 7 Bureau Order*.³⁸ In addition, the parties filed a joint request to dismiss the complaint in *Cavalier II*.³⁹ The parties further indicate that settlement will also result in dismissal of all other proceedings between the parties in federal and state court and in arbitration.⁴⁰

III. DISCUSSION

A. We Grant the Motion to Vacate the *June 7 Bureau Order*.

15. In connection with settlement of their multi-forum dispute, the parties have jointly requested that we vacate the *June 7 Bureau Order*. The parties state that vacatur of this order “is a lynchpin to the global settlement” of their long-running dispute.⁴¹ Specifically, the parties argue that the *June 7 Bureau Order* failed to clarify the rights and obligations of the parties, and that “competing interpretations” of certain portions of the *June 7 Bureau Order* “have engendered a series of new disputes,” and generally “muddl[ed] the parties’ relationship and cloud[ed] their operations.”⁴² The parties maintain that “vacatur will allow the parties to implement a settlement that will resolve, with certainty, their myriad issues, free of the future threat and burden of litigating the interpretation and application” of the *June 7 Bureau Order*.⁴³ The parties indicate that, absent the global settlement and vacatur, “the Commission should anticipate a third pole attachment complaint filed by Cavalier, as well as subsequent Applications for review, and appeals to the federal court of appeals,” that challenge the new pole attachment rates imposed by Dominion.⁴⁴

16. Although rare, the Commission previously has vacated orders in connection with approval of a settlement agreement.⁴⁵ Consistent with the Supreme Court’s decision in *U.S.*

³⁸ *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, Consent Motion for Leave to Withdraw Motion for Immediate Affirmance and Enforcement of June 7, 2000 Order of the Cable Services Bureau, PA File No. 99-005 (filed November 6, 2002) (“*Motion to Withdraw Affirmance Request*”).

³⁹ *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, Joint Notice of Settlement and Motion to Dismiss, File No. EB-02-MD-005 (filed November 6, 2002). This motion was granted in a separate order released simultaneously with this one. See *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, Order, File No. EB-02-MD-005 (MDRD-Enf. Bur. rel. December 3, 2002).

⁴⁰ *Motion for Vacatur* at 2, 5, 8-9, 11.

⁴¹ *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, Letter from Charles A. Zdebski, Counsel for Dominion, to Lisa B. Griffin, Deputy Chief, Market Disputes Resolution Division, Enforcement Bureau, FCC, File Nos. PA-99-005 and EB-02-MD-005 (September 30, 2002).

⁴² *Motion for Vacatur* at 10.

⁴³ *Id.* at 11.

⁴⁴ *Id.* at 8.

⁴⁵ See *Applications of Crystal Communications, et al.*, Order, 12 FCC Rcd 2149 (1997) (“*Crystal*

Bancorp Mortgage Company v. Bonner Mall Partnership,⁴⁶ however, the Commission has stated that it will not routinely vacate orders in connection with settlements, but will do so only where “the parties make a showing of some special circumstances beyond the mere fact that the case has been settled.”⁴⁷ In making this determination, the Commission considers the public interest in maintaining any precedential effect of the order in question.⁴⁸

17. We find that, under the unique circumstances presented here, vacatur of the *June 7 Bureau Order* is in the public interest, because it will bring to an end the multiple and related lawsuits burdening the dockets of the Commission, the courts, and an alternative dispute resolution forum. As described above, the global settlement between the parties would dispose of several Commission proceedings, including two Applications for Review and a Motion for Immediate Affirmance in this action, as well as a separate but related complaint proceeding between the parties. The settlement will also bring to an end existing proceedings in other venues as well. Moreover, as evidenced by the scope of the litigation between the parties to date,⁴⁹ both the Commission and the courts are faced with the prospect of future litigation between the parties on these and related issues.⁵⁰ In addition to resolving the numerous existing proceedings, the settlement and requested vacatur promise to stave off the undoubtedly complex and time-consuming litigation between the parties that would otherwise inevitably occur.

18. In our view, the resolution of these myriad legal actions, both those now pending and those anticipated to be filed, which would otherwise require the expenditure of substantial time and resources of both the Commission and the courts, constitutes “special circumstances” necessary to warrant vacatur of the *June 7 Bureau Order*. As the history of the parties’ disputes makes clear, this is not a case in which two parties to a single complaint proceeding seek vacatur of an order as part of settlement of a single proceeding.

19. We conclude that the opportunity to resolve these numerous proceedings in multiple fora outweighs our general interest in preserving the *June 7 Bureau Order*. Accordingly, we grant the parties’ joint motion to vacate the *June 7 Bureau Order*. We wish to emphasize, however, that our decision to vacate the *June 7 Bureau Order* does not reflect any disagreement with or reconsideration of any of the findings or conclusions contained in the *June*

Communications”); *Applications of Richard M. Carrus, et al.*, Order, 13 FCC Rcd 7049 (Admin. Law Div.-OGC 1998); *GTE Telenet Comm. Corp. v. American Tel. & Tel. Co.*, Memorandum Opinion and Order, 1986 WL 292091 (Com. Car. Bur. July 10, 1986).

⁴⁶ 513 U.S. 18 (1994).

⁴⁷ *Crystal Communications*, 12 FCC Rcd at 2151, ¶ 6.

⁴⁸ See, e.g., *Aetna Casualty and Surety Co. v. Home Insurance Co.*, 882 F. Supp. 1355 (S.D.N.Y. 1995).

⁴⁹ See paras. 7-14, *supra*.

⁵⁰ See *Motion for Vacatur* at 8.

7 Bureau Order.

B. We Grant the Motion to Withdraw the Applications For Review of the *June 7 Bureau Order* and the *September 18 Bureau Order*.

20. As part of their global settlement and requested vacatur, the parties jointly moved to withdraw Dominion's Application for Review of the *June 7 Bureau Order*, as well as Dominion's Application for Review of the *September 18 Bureau Order*.⁵¹ The parties maintain that they "have agreed to negotiate in good faith a pole attachment agreement that the parties believe will provide mutually agreeable stability in the working relationship between the two companies."⁵² Therefore, and in conjunction with their joint motion to vacate, the parties move that we dismiss the Applications for Review without prejudice.⁵³

21. We grant the parties' Motion to Withdraw the Applications for Review, without prejudice. We find that withdrawal of the Applications for Review at this stage is appropriate, and will serve the public interest by promoting the private resolution of disputes and by eliminating the need for further litigation and the expenditure of additional time and resources of the parties and this Commission.

C. We Grant the Motion to Withdraw the Motion for Immediate Affirmance and Enforcement of the *June 7 Bureau Order*.

22. Also as part of their global settlement and requested vacatur, the parties jointly moved to withdraw Cavalier's Motion for Immediate Affirmance and Enforcement of the *June 7 Bureau Order*.⁵⁴ For the same reasons set forth above, we grant the parties' Motion to Withdraw the Motion for Immediate Affirmance and Enforcement of the *June 7 Bureau Order*, without prejudice. We find that withdrawal of this motion at this stage is appropriate, and will serve the public interest by promoting the private resolution of disputes and by eliminating the need for further litigation and the expenditure of additional time and resources of the parties and this Commission.⁵⁵

IV. ORDERING CLAUSES

23. ACCORDINGLY, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), and 224 of

⁵¹ *Motion to Withdraw AFRs, supra* n.35.

⁵² *Id.* at 2, ¶ 5.

⁵³ *Id.* at 3.

⁵⁴ *Motion to Withdraw Affirmance Request, supra* n.36.

⁵⁵ In addition, we dismiss as moot Cavalier's Motion for Leave to File Motion for Immediate Affirmance and Enforcement of Bureau Order, PA File No. 99-005 (filed February 20, 2001).

the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), and 224, and section 1.1415 of the Commission's rules, 47 C.F.R. § 1.1415, and authority delegated by sections 0.111, and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that the Order and Request for Information issued by the Cable Services Bureau on June 7, 2000 in the above-captioned proceeding, *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, Order and Request for Information, 15 FCC Rcd 9563 (Cable Serv. Bur. 2000), IS VACATED in its entirety.

24. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), and 224, and section 1.1415 of the Commission's rules, 47 C.F.R. § 1.1415, and authority delegated by sections 0.111, and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that the parties' Consent Motion to Withdraw Applications for Review of June 7, 2000 and September 18, 2000 Orders of the Cable Services Bureau without prejudice in the above-captioned proceeding IS GRANTED in its entirety.

25. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), and 224, and section 1.1415 of the Commission's rules, 47 C.F.R. § 1.1415, and authority delegated by sections 0.111, and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that the parties' Consent Motion for Leave to Withdraw Motion for Immediate Affirmance and Enforcement of June 7, 2000 Order of the Cable Services Bureau without prejudice in the above-captioned proceeding IS GRANTED in its entirety.

26. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), and 224, and section 1.1415 of the Commission's rules, 47 C.F.R. § 1.1415, and authority delegated by sections 0.111, and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that Cavalier's Motion for Leave to File Motion for Immediate Affirmance and Enforcement of Bureau Order, filed February 20, 2001, IS DISMISSED as moot.

27. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 224, and section 1.1415 of the Commission's rules, 47 C.F.R. § 1.1415, and authority delegated by sections 0.111, and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that the above-captioned complaint proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau